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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

FRANTZ Y. RICHARD,

*Petitioner,*

*vs.*

MICHAEL O. LEAVITT,
SECRETARY OF HEALTH & HUMAN SERVICES,

*Respondent.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a district court may grant summary judgment in an employment discrimination case without allowing the plaintiff an opportunity for discovery to determine whether the employer's articulated reasons for promoting another employee were a pretext for discrimination?

2. Whether the plaintiff in an employment discrimination case must produce evidence of pretext in order to be allowed discovery?

3. Whether in ruling on a motion for relief under Fed.R.Civ.P. Rule 56(f), the district court should balance the plaintiff's need for discovery against the burden that discovery might cause the defendant?

## LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

a. Frantz Y. Richard, Plaintiff-Appellant;

b. Michael O. Leavitt, Secretary of Health & Human Services, Defendant-Appellee;

c. Richard L. Swick and David H. Shapiro, Attorneys for the Plaintiff-Appellant;

d. Allen F. Loucks, Assistant U. S. Attorney, and Jason Daniel Medinger, Assistant United States Attorney, for the Defendant-Appellee.

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Petitioner, Frantz Y. Richard, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The decision of the Court of Appeals was not selected for publication in the Federal Reporter and is referenced at *Richard v. Leavitt*, 235 Fed.Appx. 167 (4th Cir.(Md.) Aug 16, 2007) (Not selected for publication in the Federal Reporter, NO. 06-1543). The Court of Appeals opinion is reproduced in the Appendix ("App.") filed herewith at 1a. The unreported bench decision of the District Court is reproduced at 3a.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 16, 2007. The Court of Appeals mandate issued on October 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The pertinent provisions of the Title VII of the Civil Rights Act of 1964, as amended, and implementing regulation are set forth below:

42 U.S.C. § 2000e-2:

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Rule 56. Summary Judgment.

* * * * *

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse

party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

(e) **Form of Affidavits; Further Testimony; Defense Required.**

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

* * * * *

Fed. R. Civ. P. Rule 56.

## STATEMENT OF THE CASE

### Procedural History

On August 30, 2005, Frantz Y. Richard sued Michael O. Leavitt in his official capacity as Secretary of the United States Department of Health and Human Services ("DHHS") alleging that, as his employer, DHHS had engaged in acts of discrimination in promotion practices against him based on his age, race, sex, and national origin that resulted in his being denied promotion to a Grade 14 supervisory position. R.[1] 1, Complaint, Joint Appendix (JA[2]) at 5-10.

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[1]Refers to docket entries in the Record of District Court.

[2]Refers to the Joint Appendix filed in the Court of Appeals.

On November 15, 2005, instead of filing an answer to Mr. Richard's complaint and before any discovery had been initiated, DHHS filed a motion to dismiss plaintiff's complaint or, in the alternative, for summary judgment. R. 8. In its dispositive motion, DHHS asserted that: (1) Richard had failed to state a claim for which relief can be granted; (2) that Richard could not establish a *prima facie* case of discriminatory failure to promote him because he did not apply for a promotion; and (3) DHHS had provided legitimate non-discriminatory reasons for Richard's not having been promoted. *Id.*

On January 14, 2006, Richard opposed DHHS's dispositive motion contending that: (1) his complaint alleging that he was denied promotion based on his race (black), sex (male), age (over 40) and national origin (Haitian) raised a valid claim under Title VII and the ADEA; (2) he could establish a *prima facie* case of discriminatory failure to promote by showing that he sought promotion, he was qualified for promotion, and that defendant manipulated its promotion process to promote a younger white female instead of him; and (3) Richard should be allowed discovery to develop evidence of pretext regarding DHHS's claims that he had not applied for the position and that the selectee was better qualified for promotion than him. In support of his request to be allowed discovery, Richard filed a motion pursuant to Fed. R. Civ. P. Rule 56(f) contending that defendant's dispositive motion was premature because he had not been allowed the opportunity for discovery. R. 14. This motion was supported by an affidavit from his

counsel explaining that plaintiff required discovery both to develop his discrimination claims and to respond to the matters raised by defendant's dispositive motion. R. 14, Ex. 1, Declaration of Richard's counsel James Simpson, JA at 98-104.

**District Court and Fourth Circuit Court Holdings At Issue**

Following oral argument on March 27, 2006, the district court issued an Oral Order granting DHHS's Motion for Summary Judgment "for the reasons stated on the record in open court." R. 18, JA at 3. On March 28, 2006, the district court entered an Order denying plaintiff's Rule 56(f) motion, finding defendant's Motion to Dismiss to be moot, granting defendant's Motion for Summary Judgment, and entering Judgment in favor of defendant and against plaintiff. Appendix at 3a, R. 19, JA at 3-4.

Richard timely filed his Notice of Appeal to the United States Court of Appeals for the Fourth Circuit on May 3, 2006. R. 21, JA at 238. The Court of Appeals entered its judgment in favor of DHHS on August 16, 2007. Appendix at 1a-2a.

## RELEVANT FACTS

### I. Facts Alleged by Plaintiff Frantz Y. Richard.

The complaint filed by appellant alleged the following facts:

Frantz Y. Richard is a fifty-one year old, African-American male of Haitian origin. He has been in the government contracting field for more than fourteen years and possesses the experience, knowledge, skills, expertise, abilities and qualifications to perform in various positions, including Procurement Analyst. Mr. Richard has earned two Associates Degrees - one in Electronic Systems Technology and the other in Contracts Management - from the Community College of the Air Force, (in January 1988 and July 1991, respectively), a Bachelor of Science Degree in Industrial Technology from Southern Illinois University (in December 1989), and a Master of Arts Degree in Procurement and Acquisitions Management from Webster University (in May 1992). Mr. Richard has served as a Senior Contracting Officer. R. 1, Complaint at ¶¶ 4, 6; JA at 6-7.

In August 1992, Mr. Richard was hired as a GS-1102-11, Contract Specialist in the Division of Acquisitions Management (DAM), Program Support Center (PSC) in the Automated Data Processing (ADP) Branch, Negotiated Contracts Section, performing acquisitions purchases through the entire spectrum of the contracting and acquisition process. *Id.* at ¶ 7.

In June 1999, Mr. Richard left DAM/PSC and started working for the HRSA Negotiated Contracts Branch as a GS-1102-12, Senior Contract Specialist. Although he was eligible for a career-ladder promotion to grade 13 based upon his outstanding performance, in January 2000, Mr. Richard was required to undergo a desk audit before he could be promoted to the grade 13 level as Senior Contract Specialist. *Id.* at ¶ 8.

In August 2003, Mr. Richard found out that Steve Zangwill, Chief Contracting Officer, Division of Procurement Management, had noncompetitively promoted a younger white female to a grade GS-14 supervisory position. *Id.* at ¶ 9.

Mr. Richard timely contacted an EEO counselor on August 29, 2003, and on December 2, 2003, he timely filed a formal administrative complaint of discrimination based on race, national origin, sex, and age alleging that despite his excellent service at HRSA and his superior qualifications for promotion to a grade 14 supervisory position, Mr. Richard had been denied promotion to such a position, while a lesser qualified, younger, white female was promoted without competition. The complaint was acknowledged by DHHS management on December 23, 2003, and given the designation of Complaint No. HRS-02-04. *Id.* at ¶ 10.

On May 14, 2004, DHHS issued a Report of Investigation ("ROI") on Complaint No. HRS-02-04. As of the date that Richard filed his complaint in the district court, DHHS had not issued a final decision. *Id.* at ¶ 14.

## II. Facts Alleged by Defendant in Support of its Motion of Summary Judgment.

In support of its motion for summary judgment, defendant submitted twenty exhibits that had been collected in the administrative record. Based upon these exhibits defendant contended that:

(1) Beginning in January 23, 2001, there were either hiring freezes and hiring controls that

placed limitations on the filling of positions at the GS-13 level and higher. *See* R. 8, Defendant's Exhibits 4-10, JA at 34-43.

(2) That notwithstanding the hiring controls, Zangwill sought to promote employees to management positions in COB and GAB. In July 2001, he selected Frank Murphy and Bonnie Garcia as Acting Team Leaders. R. 8, Def. Ex. 1 Zangwill Decl. at 3, JA at 13; Def. Ex. 2 Marra Decl. at 3, JA at 19. Both of these selections were temporary appointments that did not involve an actual promotion in grade. As such, there were no vacancy announcements or competition for the selections.

(3) In July 2003, after Ms. Garcia served as an Acting Team Leader for two years, Zangwill requested that Ms. Garcia be promoted to a GS-14 based upon an "accretion of duties." R. 8, Def. Ex. 1 at 4, JA at 14, and Def. Ex. 2 at 1-2, JA at 17-18; *see also* R. 8, Def. Ex. 11, JA at 43-45.

(4) At approximately the same time, Zangwill posted an announcement for the Team Leader of the Contracts Operation Branch. There was an open competition, and Frank Murphy was selected.

(5) After the Agency determined that Ms. Garcia was doing Grade 14 work, the Agency promoted her to the position of Lead Contract Specialist, GS-1102-14, GAB, effective July 27, 2003, "due to accretion of duties." R. 8, Def. Ex. 14, JA at

51. By the two-step process of assigning Ms. Garcia Team Leader duties and then determining that her new duties merited a grade 14 position, the Agency promoted Ms. Garcia by upgrading her existing position without ever advertising a vacancy or allowing competition for the promotion. R. 8, Def. Ex. 12 at 2, JA at 47.

III. **Richard's Rule 56(f) Motion.**

In addition to responding to defendant's claims that he had failed to state a claim and that he could not establish a *prima facie* case of discrimination, Richard moved, pursuant to Fed.R.Civ.P. 56(f), that he be allowed discovery regarding, among other things, DHHS's claim that it had legitimate non-discriminatory reasons for Richard's not having been promoted. In pertinent part, Richard's counsel stated:

> 5. Viewing defendant's motion as one for summary judgment, plaintiff is in the impossible position of having to unearth and present all of the evidence needed to establish that his employment discrimination claims are plausible causes of action sufficient to avoid summary judgment without the aid of any discovery to obtain data and documents, identify potential witnesses to be interviewed and deposed, and obtain witness testimony. Defendant's motion refers to exhibits, which include affidavits and declarations of defendant's management officials, as well as

documents that are clearly outside of the pleadings in this matter. Without discovery, plaintiff cannot depose defendant's declarants/ affiants or obtain witness testimony about the declarations, affidavits, and documents. Moreover, without discovery plaintiff can neither access other documents nor elicit deposition testimony (or even obtain the identity of potential witnesses) that would likely either support his legal claims, cast doubt on the veracity of defendant's assertions in support of his dispositive motion, or properly address defendant's proffered, non-discriminatory reason for plaintiff not being promoted.

6. For example, some of the issues on which plaintiff would need paper discovery and deposition testimony to properly respond to defendant's dispositive motion or otherwise prepare to litigate his claims on the merits -- with citations to the memorandum submitted by defendant in support of his dispositive motion or to the complaint -- are as follows:

-- Discussions between plaintiff and his supervisors concerning plaintiff's stated desire to be promoted to GS-14. [Def.'s Mot. at 19; Def.'s Ex. 2, Dr. Marra Affidavit at 4 ("I believed then and

I believe now that he has promotion potential.")]:

-- When did such discussions take place? Who was present? What was said?

-- What actions, if any, did management officials take with regard to plaintiff's stated desire to be promoted to GS-14? Who was consulted? What was said?

-- Timing and substance of discussions between plaintiff and his supervisors regarding possible promotion opportunities for plaintiff? Were there any special factors and/or considerations regarding any possible promotion opportunities for plaintiff?

-- The reasons why plaintiff was not promoted to GS-14?

-- Identify witnesses, locate and obtain documents, elicit witness testimony about documents, conversations, meetings, and regarding the state of mind of the decision maker(s) with regard to all the above matters.

-- The manner in which management approached plaintiff concerning plaintiff working on simplified acquisitions

matters in the General Acquisitions Branch in 2001. [Def.'s Mot. at 18]:

- Why was plaintiff not assigned to work as the acting team leader of the General Acquisitions Branch ("GAB")? Why was Ms. Garcia assigned to the acting team leader position? How? When? On what authority?
- Who was consulted in the decision not to assign plaintiff to the acting team leader position? Who was consulted in the decision to assign Ms. Garcia to the acting team leader position? What other GS-13 employees were considered for the acting team leader position?
- Did defendant receive any notice/warnings from any personnel within the organization that some or all of these decisions might be discriminatory?
- Identify witnesses, locate and obtain documents, elicit witness testimony about documents, conversations, meetings, and regarding the state of mind of the decision maker(s) with regard to all the above matters.
- The decision by management to request the desk audit for Ms. Garcia that

resulted in her promotion to the GS-14,General Acquisitions Branch Chief position. [Def.'s Mot. at 6-7]:

-- Who made the decision? On what grounds? How? When?

-- How many "management-requested" desk audits for incumbent GS-13 positions were processed and how many resulted in promotions during the period 2001-2004? When? What was management's criteria for requesting desk audits for GS-13 positions? How were they selected? Who made the decision? Who was consulted? What positions were audited? What positions were upgraded to GS-14?

-- Did defendant receive any notice/warnings from any personnel within the organization that some or all of these decisions might be discriminatory?

-- Identify witnesses, locate and obtain documents, elicit witness testimony about documents, conversations, meetings, and regarding the state of mind of the decision maker(s) with regard to all the above matters.

- The reason(s) why the GS-14 GAB branch chief position, for which Ms. Garcia was serving in an acting capacity, was not competitively announced in 2003. [Def.'s Mot. at 6-7]:
  - Who made the decision? On what grounds? How? When? On what authority?
  - Why could the position not have been competitively announced?
  - Who was consulted in the decision not to competitively announce the GAB team leader position? When? What was discussed?
  - Compare the qualifications of plaintiff and Ms. Garcia for the GS-14 position into which Ms. Garcia was noncompetitively placed in approximately July/August 2003.
  - Identify witnesses, locate and obtain documents, elicit witness testimony about documents, conversations, meetings, and regarding the state of mind of the decision maker(s) with regard to all the above matters.
- The circumstances surrounding the freeze of GS-13/14 promotions within DHHS during 2001-2003. [Def.'s Mot. at 4-6; Def.'s Ex. 4-8]:

- When were restrictions placed on promotions to GS-13/14? Who made the decision? On what grounds? How? When? What restrictions or exceptions were provided? Who was consulted?
- When were restrictions lifted on promotions to GS-13/14? Who made the decision? On what grounds? How? When? What restrictions or exceptions were provided? Who was consulted?
- How were the decisions to restrict promotions to GS-13/14 announced to DHHS employees? How was the decision to lift restrictions on promotions to GS-13/14 announced to DHHS employees? Who was consulted in these decisions? When? What was discussed?
- Identify witnesses, locate and obtain documents, elicit witness testimony about documents, conversations, meetings, and regarding the state of mind of the decision maker(s) with regard to all the above matters.

R. 14, Ex. 1 Decl. of James Simpson, January 13, 2006, JA 98-104.

IV. The District Court Decision.

The district court began its Oral Order by stating:

> The Court views this case as to whether there is a genuine issue of material fact under Rule 56, defense counsel is correct that this Court and other members of the court have granted pre-discovery Summary Judgment Motions in these Title 7 cases. And so there's nothing that the Court is mandated to do by the mere fact that plaintiff has filed a Rule -- a Rule 56(f) motion.

Appendix at 5a.

The district court went on to find that:

> The claim that the defendant makes is that during the relevant period of this claim, there was a hiring freeze generally with regard to hiring at the GS-13 level and above. There were some -- there was someone who was in the contracts operation branch. He left. There was an inability to fill his position because of the freeze, and Stephen Sangwell [sic] became the person charged with both the contracts operation branch and the general acquisitions branch. He designated Frank Murphy to act as a team leader under the contracts operation branch and Alexandria Garcia to be the team leader of the general

> acquisitions branch. There was apparently a -- eventually a posting with regard to the contracts operations branch that the plaintiff Richard applied for when Murphy was, in fact, selected. And that was an open competition, it's not the basis of a claim here.

Appendix at 6a.

The district court further observed that:

> The defendant's position is that there was -- they were not able to do an open competition with regard to the other branch supervisory position. But, in fact, Garcia was chosen to be the acting team leader of that branch, and she served in that position for, according to the defendant, some 24 months where she was effectively supervising, and there were duties that were added to her position, an accretion of duties.

*Id.*

The district court then found that:

> Now, there's no dispute that apparently a person could -- can in the course of holding a position which involves accreted duties undergo a desk audit which could result in the elevation of that person's grade level. And that apparently is what happened with Garcia, that there were substantial additional duties beyond the GS-13 that were determined

> to be performed by her. She was then permanently selected as the lead contract specialist in the simplified contracts branch

*Id.*

Finding an absence of direct evidence of discrimination, the district court applied the *McDonnell Douglas* model and focused on whether plaintiff would be able to prove pretext, noting that to prevail on his failure to promote claim "the plaintiff would have to demonstrate that there was pretext in the decision." Appendix at 8a. The district court thereupon defined the issue as "whether there -- a legitimate non-discriminatory reason has been given, and [whether] the plaintiff can demonstrate in any way pretext." Appendix at 10a.

Then, based upon documents from the administrative investigation submitted by defendant in support of its dispositive motion, the district court determined that both the selectee (Garcia) and Richard appeared to be well-qualified. The district court ruled that because there was no evidence "that show[ed] that she [Garcia] is distinctively less qualified than he, or, ... some sort of a manufactured reason as to why she got the job and he didn't," that Richard could show no more than mere unfairness. Next, with only the documentary evidence gathered by the Agency in the administrative phase, the district court ruled:

> The Court is satisfied that a legitimate non-discriminatory reason has been articulated, and there is simply nothing

> to suggest pretext. Now, I would read the cases differently from the plaintiff. I don't think that it's enough to say, well, we need discovery to establish pretext even in the face of a legitimate non-discriminatory reason. I don't see that. Something needs to be presented to the Court that suggests, as I said, some, some indication of potential illegal discrimination. I don't see that anywhere here.

Appendix at 12a. In short, the district court held that a plaintiff in a discrimination case needs to have evidence of pretext, even before conducting discovery.

V. Decision of the Court of Appeals.

On appeal, the Fourth Circuit noted that as a general rule, summary judgment is appropriate only after adequate time for discovery and that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. However, the Court of Appeals affirmed the district court's ruling stating:

> Because Richard failed to identify relevant information or demonstrate that information relevant to his claim actually existed, we find the district court did not abuse its discretion denying the motion for discovery. We further find that the district court order granting summary judgment was appropriate.

Appendix at 3a.

## REASONS FOR GRANTING THE WRIT

### I. Courts of Appeals Disagree on the Standard for Granting a Party Opposing a Motion For Summary Judgment Discovery Pursuant to FRCP 56(f).

Nothing in Rule 56(f) requires the party opposing summary judgment to present the proof creating even minimal doubt on the issue of fact in order to be allowed discovery. The rule provides only that the party opposing summary judgment show that there are circumstances which limit his ability to present the proof necessary to show that there are issues of fact by affidavit. Certainly, in discrimination cases or other such cases where the motive of the moving party is at issue, summary judgment should not be granted until the plaintiff has had an opportunity for discovery, as the plaintiff typically has "little or no familiarity with the internal affairs [or motives] of the" defendant. In such circumstances" where plaintiff is faced with affidavits setting forth in great detail management's version of what actions were taken and what motives led the affiants to take these actions," the facts in such a case are exclusively in the possession of the defendants. *Schoenbaum v Firstbrook*,405 F.2d 215, 218 (2nd Cir. 1968), *cert. denied* 395 U.S. 906, 23 L.Ed.2d 219, 89 S.Ct. 1747 (1969) (holding that summary judgment should rarely be granted against a plaintiff in a stockholder's derivative action where "there will be issues as to the knowledge, intent and motive which will require a full trial with an opportunity to observe the demeanor of the witnesses"). Likewise, in discrimination cases, the

need for discovery is particularly acute because the core issue is typically the employer's motives for its actions. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

In this case, however, the Court of Appeals has endorsed a rule that requires the plaintiff in a discrimination case to produce evidence that the employer's stated reasons for its actions are pretextual before being allowed any discovery at all. Indeed, there have been a series of rulings from the Fourth Circuit which refuse discovery to a plaintiff unless he or she already has the evidence to prove his discrimination. For example, in *Boyd v. Guiterrez*, 214 Fed. Appx. 322 (4th Cir. 2007), the court upheld the granting of summary judgment in favor of defendant without providing plaintiff opportunity for discovery, despite an affidavit from the plaintiff attesting that he was unable to present facts in opposition to defendant's motion for summary judgment without the benefit of discovery. However, in most cases, the discrimination plaintiff cannot provide the specific facts sought to be obtained from discovery without actually conducting discovery. *But see Chernova v. Electronic Systems Services, Inc.*, 247 F.Supp.2d 720, 722-23 (D. Md. 2003) (district court stayed a motion for summary judgment to allow discovery in a pregnancy discrimination case to permit plaintiff to develop evidence of pretext and motive).

Moreover, an examination of the rulings in the circuit courts shows that there is wide range of holdings regarding the circumstances where a motion

for summary judgment should be granted without allowing the plaintiff discovery. The Eleventh Circuit interprets Rule 56(f) to require the district court "to balance the movant's demonstrated need for discovery against the burden such discovery will place on the opposing party." *Harbert Intern., Inc. v. James,* 157 F.3d 1271, 1280 (11th Cir. 1998); *Salas v. Tillman*, 162 Fed.Appx. 918, 922 (11th Cir. 2006)(Rule 56(f) motion must be supported by an affidavit which sets forth with particularity the facts the moving party expects to discover and how those facts would create a genuine issue of material fact). The district court in the instant case adopted that very approach. *See* Appendix at 9a ("the Court has to balance that against extensive, extensive discovery that the Government would be required to undertake").

However, to varying degrees the other Circuits examine the nature of the information sought and whether the plaintiff has been diligent in seeking discovery rather than a balancing approach. For example, the First Circuit requires the party seeking relief under Rule 56(f) to articulate some plausible basis to support a belief that discoverable material exists which, if available, would suffice to raise a trial-worthy issue. *Filiatrault v. Comverse Technology, Inc.*, 275 F.3d 131, 137 (1st Cir. 2001) (denying a third round of discovery after having previously granted Rule 56(f) relief because plaintiff "was inexplicit about what additional discovery he wished to pursue or why he wanted to pursue it."). Similarly, the D.C. Circuit recognizes that "a party opposing summary judgment needs a 'reasonable opportunity' to complete discovery

before responding to a summary judgment motion and that 'insufficient time or opportunity to engage in discovery' is cause to defer decision on the motion." *Khan v. Parsons Global Services, Ltd.*, 428 F.3d 1079, 1087 (D.C.Cir. 2005); *Martin v. Malhoyt*, 830 F.2d 237, 256 (D.C.Cir. 1987); *see also First Chi. Int'l v. United Exch. Co.*, 836 F.2d 1375, 1380 (D.C.Cir. 1988).

Like the First Circuit, the Seventh and Eighth Circuits will allow discovery where the Rule 56(f) movant explained what discovery was necessary and why he has been unable to obtain information sought. *Reed v. Lawrence Chevrolet, Inc.*, 14 Fed. Appx. 679, 685 (7th Cir. 2001) (summary judgment reversed in employment discrimination case to allow plaintiff to discover information about employer's hiring practices); *Bernard v. Casino Magic Corp.*, 293 F.3d 419, 426-27 (8th Cir. 2002) (denying extension of discovery deadline despite obstructionist and delay tactics of defendant where there had been a two-year discovery period and plaintiff failed to provide Rule 56(f) affidavit). The Sixth Circuit also has indicated that additional discovery need not be allowed where plaintiff failed to file affidavit outlining that it could not present essential facts and failed to indicate what material fact it hoped to uncover with additional discovery. *U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 863 (6th Cir. 2005); *see also Boyd v. Bressler*, 18 Fed. Appx. 360, 368 (6th Cir. 2001) (request to extend discovery deadline denied where plaintiff was dilatory in his discovery efforts and did not identify the information he alleged would have changed the district court's ruling on the summary judgment motion).

The Second Circuit employs a more exacting requirement that the party opposing summary judgment submit an affidavit addressing four specific points: (1) what facts are sought to resist the motion and how they are to be obtained; (2) how those facts are reasonably expected to create a genuine issue of material fact; (3) what effort affiant has made to obtain them; and (4) why the affiant was unsuccessful in those efforts. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303 (2d Cir. 2003); *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999). But, unlike the Fourth Circuit and Eleventh Circuit, the Second Circuit has not seen fit to outright deny discovery to a plaintiff in a civil rights case where the motives of the decision-makers are at issue. *See Weeks v. New York State Div. of Parole*, 78 Fed. Appx. 764, 765-66 (2d Cir. 2003) (upholding the denial of a plaintiff's request for *additional* discovery before ruling on defendants' summary judgment motion, where plaintiff sought to discover names of other employees who had been charged with misconduct but not fired, who were not similarly situated); *see also Patton v. General Signal Corp.*, 984 F.Supp. 666, 672-73 (W.D.N.Y. 1997)(Rule 56(f) motion denied for party seeking additional discovery was "less than diligent" in the initial discovery period).

In determining whether to allow a Rule 56(f) request for discovery by a plaintiff in a discrimination case, the Third and Fifth Circuits examine the plaintiff-employee's conduct of discovery prior to the filing of the motion for summary judgment and possible culpability in failing to complete discovery.

*Bates v. Tandy Corp.*, 186 Fed. Appx. 288, 291-2 (3d Cir. 2006) (denying relief under Rule 56(f) where inadequacy of the record is attributable to the movant's own failure to take advantage of the discovery period, rather than the other party's lack of cooperation.); *Coleman v. City of Philadelphia*, 80 Fed. Appx. 279, 282 (3d Cir. 2003) (plaintiff not entitled to extension of discovery deadline where counsel failed to commence discovery until the day before the deadline for completion of discovery, and did not file motion for adequate opportunity to obtain discovery); *but see Pagano v. Hadley*, 553 F.Supp. 171, 178 (D. Del. 1982) (plaintiff granted three-month period for further discovery pursuant to Rule 56(f), Federal Rules of Civil Procedure, even though plaintiff had ample time to take discovery). The Fifth Circuit likewise requires the party opposing summary judgment to explain the type of information he would have obtained through additional discovery. *Santiago v. City of Houston*, 232 Fed. Appx. 381, 385 (5th Cir. 2007); *see also Securities & Exchange Com. v. Spence & Green Chemical Co.*, 612 F.2d 896, 901 (5th Cir. 1980) (Rule 56(f) movant required to "conclusively justif[y]" his entitlement to additional time for discovery after the initial period of discovery has run by specifically demonstrating "how postponement of the ruling on the motion will enable him, by discovery or other means, to rebut movant's showing of absence of genuine issue of fact.").

The Ninth Circuit approach is similar to the Third Circuit. In determining whether a Rule 56(f) request for *additional* discovery should be granted, the court examines whether the Rule 56(f) movant was

diligent in pursuing previous discovery opportunities, and whether the movant can show how additional discovery would preclude summary judgment. *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 939 (9th Cir. 2002) (additional discovery not required where provisions of agreement are not susceptible to plaintiff's construction as a matter of law); *see also Siddiqui v. AG Communication Systems Corp.*, 233 Fed. Appx. 610, 613 (9th Cir. 2007) (after two-year discovery period, plaintiff not entitled to additional discovery to where he did not explain how additional discovery would aid in opposing summary judgment or why he had not previously sought such information);. *Granlund v. Clark*, 143 Fed. Appx. 802, 803 (9th Cir. 2005) (Rule 56(f) motion for additional discovery not to allowed where plaintiff did not diligently pursue discovery); *Taylor v. Sealand Services*, 70 Fed. Appx. 944, 945 (9th Cir. 2003) (plaintiff not entitled to continuance for further discovery where he failed to file a statement of reasons why he could not present by affidavit facts essential to support his opposition to the employer's summary judgment motion).

## II. This Court should Define the Limited Circumstances where Pre-Discovery Motions for Summary Judgment Can be Granted.

While Courts in the Fourth and Eleventh Circuits have held that it is necessary to "balance" the costs of discovery against the plaintiff's need for discovery in determining whether to grant summary judgment without discovery, Rule 56(f) does not permit such an interpretation. Indeed, pre-discovery summary judgment motions should be granted only in very

limited circumstances where: (a) the non-moving party failed to file a Rule 56 affidavit or was lax in conducting discovery; (b) the non-moving party already had access to the evidence; and (c) the non-moving party failed to specify the evidence sought. *See Harlow v. Fitzgerald*, 457 U.S. 800,817-818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (In a constitutional tort case against high level government officials immunity should be determined before discovery is conducted because immunity is a matter of law and unnecessary discovery of high level officials disrupts the government.); *Kinney v. Washington Gas Light Co.*, 83 F.3d 415 (4th Cir. 1996) (unpublished table opinion, text in Westlaw) (affirming pre-discovery grant of summary judgment because plaintiff did not demonstrate his qualification for the position at issue and plaintiff had access to all evidence regarding his qualifications); *Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1177 (8th Cir. 1998) (medical malpractice case where Court affirmed summary judgment because plaintiff sought an extension of the discovery period only to secure the affidavit of his own doctor); *Chambers v. Am. Trans. Air, Inc.*, 17 F.3d 998, 1002-03 (7th Cir. 1994) (affirming summary judgment because plaintiff failed to file a timely Rule 56(f) affidavit and plaintiff had not established a prima facie case); *Raymond v. United States Capitol Police Bd.*, 157 F.Supp.2d 50, 55 (D.D.C. 2001) (holding that discovery would not enable the plaintiff to establish a prima facie case thereby putting her case in "the unusual category in which the court will grant the defendant's motion for summary judgment before any discovery has begun").

In contrast, where the plaintiff has established a prima facie case of discrimination, courts allow the plaintiff "to discover evidence necessary to establish the pretextual nature of the explanation given by the Defendant." As this Court noted in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), through discovery, a plaintiff may even uncover other evidence, such as direct evidence, rendering the prima facie analysis inapplicable. Moreover, the issue of pretext is highly fact-specific and is almost always exclusively within the knowledge of the employer. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981) (noting that after a prima facie case is established, "the factual inquiry proceeds to a new level of specificity," and the plaintiff should have "a full and fair opportunity to demonstrate pretext"). Depositions of decisionmakers are necessary to give a discrimination plaintiff "a full and fair opportunity to show that [the employer's] articulated reason for [an employment action] was pretextual." *Sutera v. Schering Corp.*, 73 F.3d 13, 18 (2nd Cir. 1995). Neither this Court nor any Circuit court has ever held that depositions are unnecessary to discover evidence of pretext.

## III. Discovery Must be allowed where as here the Plaintiff's Rule 56(f) Affidavit Specified Evidence He Sought on The Fact-Intensive Issues of Motive and Pretext.

Richard's Rule 56(f) affidavit provided a detailed list of the discovery sought, including evidence to contradict the government's articulated reasons for not promoting him – an intensely factual issue. Under the

"balancing" test adopted by the Eleventh Circuit and upheld by the Fourth Circuit in the instant case, the plaintiff is penalized for identifying a wide range of areas for which he requires discovery. Thus, the very fact that extensive discovery (which might prove expensive) is required tips the balance in favor of denying discovery to him. This perverse result cannot be the law. Indeed, in *Reed*, the fact that extensive discovery was necessary is the reason that the Seventh Circuit overturned the district court's denial of a discrimination plaintiff's Rule 56(f) motion. The Court held that denial of discovery "deprived [the plaintiff] of the ability to obtain the information he needed to demonstrate pretext." 14 Fed. Appx. at 685. The Court noted that "[t]o stave off summary judgment on the pretext issue, [the plaintiff] had to present evidence that the reasons [the employer] gave for not hiring him were phony and that [defendant's witnesses] did not honestly believe them." *Id.* The Court observed that the plaintiff could not "reasonably be expected to challenge the ... proffered reasons ( i.e., lack of experience, no long-term interest in sales, gaps in [the plaintiff's] employment record) without having, at least, the opportunity to conduct discovery regarding whether [the employer] applied the same standards to Caucasian applicants." *Id.* The Court further found that the plaintiff needed "complete information about how long [the employer's] salespeople held their positions or whether they were transferred or promoted ... to challenge [the employer's] claim that it wanted to hire only those with a long-term interest in sales." *Id.* Likewise, the plaintiff was entitled access to job applications to

challenge the employer's assertion that it "did not want to hire persons with spotty employment records." *Id.* The Court observed that without the applications, the plaintiff-employee could not investigate whether the employee routinely refused to hire African-Americans. *Id.*

The D.C. Circuit adopted a similar approach in *Kahn.* The Court recognized that a party opposing summary judgment needs a "reasonable opportunity" to complete discovery before responding to a summary judgment motion and that "insufficient time or opportunity to engage in discovery" is cause to defer decision on the motion. *Citing Martin v. Malhoyt,* 830 F.2d 237, 256 (D.C.Cir.1987); *First Chi. Int'l v. United Exch. Co.*, 836 F.2d 1375, 1380 (D.C.Cir.1988). The *Khan* Court noted that the employer had attached affidavits of its managers to its motion for summary judgment and that the motion relied upon information in the employers sole control and the plaintiffs should not be forced "to operate in the dark " in opposing the motion for summary judgment.

However, in *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 245 (4th Cir. 2002), the court allowed the non-moving party's discovery because its request for discovery was sufficiently limited to seeking evidence of the defendant's "bad faith." *Id.* (Harrods argued only that "evidence of bad faith is uniquely in the possession of defendants, and Harrods needed to seek and obtain discovery . . . before it can present further evidence on bad faith and other issues"). Because Harrods specifically noted that it needed discovery on the issue of "bad faith," the court

distinguished its request from the "numerous vague assertions" made in *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995) which affirmed the of pre-discovery grant of summary judgment .

Adhering to Fourth Circuit's precedent, the district court of Maryland considered the following 56(f) request for discovery sufficiently specific to permit discovery:

> In her opposition, plaintiff states why she needs discovery and what discovery she plans to request. She contends that she needs interrogatories, depositions, and document production to prove [defendant's] alleged discriminatory intent and that ESS's reasons for terminating her were pretextual. (Pl.'s Opp'n at 7).

*Chernova v. Elec. Sys. Svs.*, 247 F.Supp.2d 720, 723 (D.Md. 2003). In contrast, where the plaintiff did not limit his request to a specific area of inquiry if permitted discovery, the district court of Maryland denied discovery. *See Fernandez v. Alexander*, 2006 WL 2473439 at *7 (D.Md., August 24, 2006) (finding the following statement insufficiently specific: "I have not been able to obtain evidence that would supply facts essential to justify my opposition to Defendant's summary judgment motion. I have a good faith belief that discovery will permit me to further establish facts, which support my claims as set forth in my Complaint and in my Memorandum.").

Thus, Richard was denied discovery precisely because he had identified broad areas in which he sought to inquire in order to show that the defendant's reasons for his non-promotion were pretextual. For example, without discovery, Richard cannot know if a witness overheard any racial remarks. To be sure, the government's evidence to justify its non-selection of Richard does not compel the conclusion that evidence of pretext is nonexistent. *See* JA at 205 (district court concluding that the evidence of defendant's legitimate reason is "pretty thin" because there is no documentation that the position at issue could not be held open for competition: "there is that uncertainty in this case, where you have Mr. Sangwell [sic] saying, I applied for two, I got one, it's pretty thin"); *id.* (government counsel admitting that there is no documentation that Zangwell requested two positions and received only one).

In effect the district court holds that a discrimination plaintiff may not conduct discovery on the issue of pretext unless the plaintiff has proof that evidence of discrimination or pretext exists. Appendix at 12a. This logic is absurd. Rule 56(f) allows the plaintiff to conduct discovery because he has a reasonable belief that evidence to support his theory exists, surely the Rule cannot require that a plaintiff support his reasonable belief that certain evidence exists without the actual evidence. Indeed, the Ninth Circuit has held that there is some basis for believing that the information sought exists unless "the record precluded the possibility that relevant information might be discovered." *VISA Int'l Serv. Ass'n v.*

*Bankcard Holders of America*, 784 F.2d 1472, 1475 (9th Cir. 1986) (*quoting Zell v. Intercapital Income Securities*, 675 F.2d 1041, 1046 (9th Cir. 1982)) ("Nothing in the present record bars the possibility that after discovery plaintiff may be able to support these allegations with proof."). Here, the employer's evidence of its alleged justification for not promoting Richard does not preclude the possibility of pretext evidence. As the following discussion shows, the employer's alleged reasons for not promoting Richard makes no sense and needs to be probed through depositions.

### A. Discovery May Reveal That The Government's Claim That It Could Not Have An Open Competition Is Unworthy of Belief.

Richard sought evidence that the government's claim that a hiring freeze prevented it from advertising the simplified contracts position is unworthy of credence. JA at 102-03. More specifically, Richard sought documentary evidence that upper-management did not approve an open competition for the simplified contracts position. In his affidavit, Zangwill claims that he was prohibited from advertising the position due to a hiring freeze. JA at 13. He does not explain, however, why a hiring freeze precluded him from posting the position internally. *Id.* The documents submitted by the government regarding the hiring freeze indicates that the Agency's policy was "no FTE growth." JA at 41; *accord* JA at 38 (noting the "Department's 700 FTE reduction target"). An

internal competition would not have caused FTE growth.

Richard has a reasonable belief that such evidence exists. Richard believes that if upper-management had denied a request for the simplified contracts position to be competed, there would be written documentation to prove it. The Agency submitted none. In addition, Richard needs to know if upper-management denied Zangwell's request for two positions, or if they specifically precluded him from advertising two positions and Zangwell chose to advertise only the negotiated contracts position. Richard has a reasonable belief that Zangwell declined to advertise the simplified contracts position because he did not want to select Richard for either position, i.e., it would be easier to justify Murphy's selection over Richard rather than Garcia's selection over Richard because Murphy was far more experienced than Garcia. Depositions of key witnesses are necessary to evidence this theory.

Richard also believes that Zangwell chose not to rotate the acting position to all the qualified 13s, because he did not want Richard to have an equal chance at competing for the job. He also believes that Zangwell intended to promote Garcia by transferring her to the acting position and assigning her grade 14 duties. Again, depositions of both Garcia and Zangwell are necessary to probe the timing and the reasons for these extra duties.

It is beyond cavil that evidence of the falsity of the government's explanation would create a material issue of fact regarding pretext and thus successfully

defeat summary judgment in this case. As the district court noted, "an agency could operate discriminatorily and clandestinely, I suppose, by dressing something up as a desk audit instead of an open competition, and so there wouldn't really be, in effect, an opportunity to compete for a position if someone's designated to be the beneficiary of a desk audit." Appendix 9a. Despite this acknowledgment, the district court denied Richard the opportunity to support this theory of the case with evidence. Because Richard identified a specific need for evidence that, if discovered, would create a genuine issue of material fact precluding summary judgment, the district court erred in denying his Rule 56(f) motion.

### B. Richard Sought Evidence to Refute The Government's Explanation for his Non-promotion.

HHS claims that it selected Garcia over Richard for the acting position because Garcia was experienced with simplified contracts (contracts under $100,000), while Richard was experienced with negotiated contracts (contracts over $100,000). *See* JA at 12, 219. The government's explanation is called into question by at least two facts. First, Mr. Murphy, who was selected as the lead for the negotiations contracts position, did not have experience with negotiated contracts, but with simplified contracts. JA at 159, 225. Secondly, the only difference between the work of a contract specialist on negotiated contracts and the work of a specialist on simplified contracts is that the negotiated contracts specialist has *more* tasks to perform on the contract. Indeed, in its motion for a

decision without a hearing at the administrative level, the government bolstered its description of Garcia's qualifications by noting that she handled "several sensitive negotiated contracts." JA at 175. Likewise, a negotiated contracts specialist could easily serve as a simplified contracts specialist. While Mr. Richard believes these assertions about the necessary qualifications, it is management's view of his qualifications and the value of his experience with negotiated contracts that counts. *See Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 960-61 ("It is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff."). Therefore, depositions of the decision-makers are required to create a genuine issue of material fact regarding this alleged justification for Richard's non-promotion.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision below reversed and remanded.

Respectfully submitted,

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Attorneys for Petitioner

# UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT.

Frantz Y. RICHARD, Plaintiff-Appellant,
v.
Michael O. LEAVITT, Secretary of Health and Human Services, Defendant-Appellee.

No. 06-1543.

Submitted: June 11, 2007.
Decided: Aug. 16, 2007.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Peter J. Messitte, District Judge. (8:05-cv-02387-PJM).
Richard L. Swick, David H. Shapiro, Swick & Shapiro, P.C., Washington, D.C., for Appellant. Rod J. Rosenstein, United States Attorney, Kristine L. Sendek-Smith, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Before MICHAEL, GREGORY, and SHEDD, Circuit Judges.

Affirmed by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Frantz Y. Richard appeals the district court

order granting summary judgment to Michael O. Leavitt, Secretary of Health and Human Services, denying his motion for discovery under Rule 56(f) of the Federal Rules of Civil Procedure and dismissing his employment discrimination complaint. Richard claims the district court erred by denying his motion for discovery and that it further erred by granting the motion for summary judgment without discovery. Finding no reversible error, we affirm.

We review a district court's refusal to allow a party to engage in discovery prior to the entry of summary judgment for abuse of discretion. *See Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir.2002). This court will not reverse a denial "unless there is a clear abuse of discretion or, unless there is a real possibility the party was prejudiced by the denial." *Ingle v. Yelton*, 439 F.3d 191, 195 (4th Cir.2006) (citation and quotation marks omitted). "As a general rule, summary judgment is appropriate only after adequate time for discovery." Evans v. *Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir.1996) (citation and quotation marks omitted). Accordingly, "summary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A denial of a Rule 56(f) application is disfavored if the motion identifies relevant information and there is some basis for believing the information actually exists. *Ingle*, 439 F.3d at 196 (citing VISA Int'l *Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir.1986)).

Because Richard failed to identify relevant information or demonstrate that information relevant to his claim actually existed, we find the district court did not abuse its discretion denying the motion for discovery. We further find that the district court order granting summary judgment was appropriate.

Accordingly, we affirm the district court's order. We dispense with oral argument*168 because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | |
|---|---|
| FRANTZ Y. RICHARD, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | )CA: PJM-05-2387 |
| | ) |
| MICHAEL O. LEAVITT, SECRETARY, U.S. DEPT. OF HEALTH & HUMAN SERVICES, | ) |
| | ) |
| Defendant. | ) |

HEARING TRANSCRIPT

Judge **Messitte**: This case, Frantz Richard has sued Michael Leavitt, who is the Secretary of Health and Human Services. He alleges employment discrimination in that he was not promoted, whereas a younger female of a different race was promoted. The claim is brought pursuant to the Title 7 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 et seq. and as further amended. There also is an age discrimination claim brought under the Age Discrimination and Duployment Act, 29 U.S.C. Section 633(a). The plaintiff alleges discrimination based on age, race, sex and national origin when he was denied promotion to a grade 14 supervisory position.

The matter is before the Court on defendant Leavitt's Motion to Dismiss or for Summary Judgment.

The plaintiff has filed a Rule 56 motion asking for further discovery prior to the Court making a determination in this regard. The Court views this case as to whether there is a genuine issue of material fact under Rule 56, defense counsel is correct that this Court and other members of the court have granted pre-discovery Summary Judgment Motions in these Title 7 cases. And so there's nothing that the Court is mandated to do by the mere fact that plaintiff has filed a Rule -- a Rule 56(f) motion.

The essential allegations are that the defendant [sic] Richard is, I think, at this age, forty-six, let me see what I have here. Born in '54, so he's fifty-one, is that --fifty-two, is that right? Yeah. Age fifty-two, he is a black male of Haitian descent. He was employed from 2000 to 2005 as a contract specialist in the Contract Operations Branch, Division of Procurement Management, Office of Management, Program Support of Health and Human Resources at DHHS, he was a G-13.

According to the structural arrangement in this operation, there were two branches. A contract's operation branch, which handled what were called negotiated contracts over $100,000, a general acquisitions branch, which handled what are called simple or simplified contracts under $100,000.

The claim that the defendant makes is that during the relevant period of this claim, there was a hiring freeze generally with regard to hiring at the GS-13 level and above. There were some -- there was someone who was in the contracts operation branch. He left. There was an inability to fill his position because of the freeze, and Stephen Sangwell became

the person charged with both the contracts operation branch and the general acquisitions branch.

He designated Frank Murphy to act as a team leader under the contracts operation branch and Alexandria Garcia to be the team leader of the general acquisitions branch. There was apparently a -- eventually a posting with regard to the contracts operations branch that the plaintiff Richard applied for when Murphy was, in fact, selected. And that was an open competition, it's not the basis of a claim here.

The defendant's position is that there was -- they were not able to do an open competition with regard to the other branch supervisory position. But, in fact, Garcia was chosen to be the acting team leader of that branch, and she served in that position for, according to the defendant, some 24 months where she was effectively supervising, and there were duties that were added to her position, an accretion of duties.

Now, there's no dispute that apparently a person could -- can in the course of holding a position which involves accreted duties undergo a desk audit which could result in the elevation of that person's grade level. And that apparently is what happened with Garcia, that there were substantial additional duties beyond the GS-13 that were determined to be performed by her. She was then permanently selected as the lead contract specialist in the simplified contracts branch.

And that is the basis of the claim that the plaintiff makes in this case, that he was precluded himself from competing for that position, and again, he's not merely precluded, but he's precluded, he says, on the basis of age, sex, race and national origin. He

being of Haitian descent, apparently Garcia being of Salvadorian descent among other differences.

The Government makes a number of arguments in favor of its Motion for Summary Judgment. The first of which is a failure to exhaust administrative remedies, and the argument that the Government makes there addressing a concern that Richard raised early on was that when Garcia was put in the temporary position, that paved the way for her ultimate elevation to GS-14. It's true that the plaintiff raised some concern at the time that Garcia was given the acting position, but the plaintiff states, and the Government really does not dispute that he didn't suffer any adverse employment action at that point because someone had simply been given a lateral position to act as a temporary supervisor. There was no adverse position for him to complain of. So he couldn't really raise that issue in any way, and the Court is not persuaded by the -- a failure to exhaust administrative remedies argument that the Government raises. The next issue is whether there's a prima facie case of discrimination based on any of these factors. And it's true that we have a male, we have someone over forty, we have someone of -- who is Haitian, someone who is of eventually African descent, all these things being allegedly differences from the status of the individual who was selected for the desk audit and received the GS-14 designation. Now, just offhand, I would observe that Haitian versus Salvadorian, I'm not sure how one makes any kind of determination based on that, how anyone could be -- claim discrimination against Haitians, but partiality of the Salvadorians, that's a toss up. That in and of

itself is not particularly persuasive. If there's any case to be made here, it's seems to me it's not a national origin case, but perhaps a race, age, gender discrimination.

But let's pass that, however, and go through. There appears to be with regard to the factors that need to be substantiated, there's obviously no direct evidence of discrimination here. There's no indication that anybody said anything or wrote anything or suggested in any way that race, age or gender or, indeed, the national origin had anything to do with this decision, which is ultimately what would have to be demonstrated by the plaintiff to prevail.

Now, a plaintiff can prevail on a failure to promote claim by showing that indirectly under the McDonnell Douglas analysis that he was qualified for the position, that he was denied an opportunity to compete, and that someone was selected for that position who was either less qualified or under circumstances that suggested discrimination.

The ··· assuming a prima facie case is made, the defendant then is permitted to show that there was a legitimate non-discriminatory reason that underlay the decision, and then showing that, the plaintiff would have to demonstrate that there was pretext in the decision.

Now, it's true that this is at the preliminary stage before discovery, but as I started out by saying that does has not deterred courts in this district or, indeed, many districts from granting pre-discovery Summary Judgment if, in fact, the record demonstrates that it would be futile to go forward with any further discovery, and, indeed, much discovery is

sought here, some four pages of inquiry is detailed by the plaintiff that he would propose to undertake in this case, despite the fact that there's been ample document exchange at the administrative level in this case.

The essential argument made by the defendant with regard to the prima facie case is that there was no position to be contested. There was no position to contest for with regard to promotion because the position that Garcia got was based on a desk audit that only she would have been eligible for and not the plaintiff. That is, someone who is performing, in effect, above grade can be reassigned to a higher grade. And that there is a certain amount of appeal to that argument in the face of what appears to have been a bona fide freeze on hiring. There was a GS-14 open competition in the contracts operation branch, there was apparently not one in the other branch. There is an affidavit from Mr. Sangwell to that effect, and that certainly is one aspect of the record that might have been fleshed out somewhat more completely from the defendant's standpoint to show that there was a specific request for two GS-14 positions and only one was granted.

But be that as it may, the Court will assume for present purposes that the -- there is some uncertainty as to whether the desk audit route, if you will, could be used for discriminatory purposes and because the desk audit route was taken here, it's arguable that an agency could operate discriminatorily and clandestinely, I suppose, by dressing something up as a desk audit instead of an open competition, and so there wouldn't really be, in effect, an opportunity to

compete for a position if someone's designated to be the beneficiary of a desk audit.

So to that extent, the Court would be inclined to assume for present purposes, without finally deciding, that there was a that a prima facie case is made. The issue really in this case at this stage is the issue of whether there -- a legitimate non-discriminatory reasonhas been given, and that the plaintiff can demonstrate in any way pretext.

Now, there is no question that with regard to the qualifications that the plaintiff was well-qualified, but on the other hand, there's no indication that even if he were in some respects better qualified than Garcia in this case, that she was not herself well-qualified. She had been in the general acquisition branch for a number of years whereas the plaintiff had been in a different branch involving other contracts.

She had then acceded to the acting position for two years where clearly she was the supervisor for two years, and she had that built up. Now, there may have been some concern expressed by the plaintiff when she was elevated to that temporary position, but, in fact, she held it, she had that experience. And as the Government argues, it certainly was not illogical for, assuming that there was a bona fide freeze, it would not be illogical to fill the position of permanent supervisor in the general acquisition branch with someone who had operated within that branch as opposed to someone who was in the coordinate branch of contract operations. So there's nothing that shows that she is distinctively less qualified than he, or, indeed, that as we allied into the pretext issue as to whether this is some sort of a manufactured reason as

to why she got the job and he didn't. This is, I think, where the Court needs to focus on the case, and that is whether there is any basis for going forward now on the issue of pretext because ultimately the plaintiff has to show in this case that it was race, gender, age or even national origin that motivated this. The mere fact that the plaintiff may have been unfairly treated certainly is not enough to make a case in this court. It may make a case before the Merit Systems Protection Board, but it's not an illegal discrimination under Title 7, which is what you have. And what you have here candidly, from the plaintiff's standpoint, is absolutely no evidence of anything, as the defendant says, that has a whiff of illegal discrimination. The plaintiff's argument is, but we're entitled to look behind this in some four pages of inquiry, areas of inquiry are delineated by the plaintiff, who says, let's get into all this and see whether we can't unearth some illegal discrimination based on race, age, gender or otherwise.

What you've got on the other hand is the prospect of considerable discovery, depositions of individuals with the - the virtual prospect, as the Court reads this record at this stage, of not the least suggestion of any illegal discrimination in this case. Had there been the least suggestion of illegal discrimination on any of the bases that the Court had seen, even a stray remark that might itself not have been enough to carry the day on the merits, the Court might have said, let's go forward with discovery. But there's nothing here that suggests anything like illegal discrimination pretext.

The Court is satisfied that a legitimate non-discriminatory reason has been articulated, and

there is simply nothing to suggest pretext.

Now, I would read the cases differently from the plaintiff. I don't think that it's enough to say, well, we need discovery to establish pretext even in the face of a legitimate non-discriminatory reason. I don't see that. Something needs to be presented to the Court that suggests, as I said, some, some indication of potential illegal discrimination. I don't see that anywhere here. And the Court has to balance that against extensive, extensive discovery that the Government would be required to undertake. And I think on balance, the plaintiff simply has not shown it. The Court will grant the defendant's Motion for Summary Judgment. The Court will deny the plaintiff's separate request for Rule 56(f) discovery. And I'll enter an order that effect today. Thank you, counsel.

THE DEPUTY CLERK: All rise. This Honorable Court now stands in recess.

THE COURT: All right, we're in recess. Thank you. The Motion to Dismiss is moot. The Court grants the Motion for Summary Judgment, the Motion to Dismiss is moot.

(Recessed at 11:40 a.m.)

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for a Writ of Certiorari was served upon respondent by U.S. mail, first-class postage prepaid on to his attorneys of record, Allen F. Loucks, Assistant U. S. Attorney and Jason Daniel Medinger, Office of the U. S. Attorney, 36 South Charles Street, Baltimore, MD 21201.

_____

Richard L. Swick

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No. 07-645

FILED
MAR 12 2008
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SUPREME COURT, U.S.

# In the Supreme Court of the United States

FRANTZ Y. RICHARD, PETITIONER

*v.*

MICHAEL O. LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals erred in holding that the district court did not abuse its discretion in denying petitioner's motion for discovery under Rule 56(f) of the Federal Rules of Civil Procedure and entering summary judgment for respondent.

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# In the Supreme Court of the United States

No. 07-645

FRANTZ Y. RICHARD, PETITIONER

*v.*

MICHAEL O. LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted in 235 Fed. Appx. 167.

### JURISDICTION

The judgment of the court of appeals was entered on August 17, 2007. The petition for a writ of certiorari was filed on November 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In 1992, petitioner, a black male of Haitian national origin born in 1954, began employment in procurement for the United States Department of Health and Human Services (HHS). Pet. App. 5a; C.A. App. 6-

7. In 1999, petitioner transferred to a Senior Contracts Specialist position, classified at grade-status (GS) 12, in the Contracts Operations Branch (COB) of the Division of Procurement Management (Division), Office of Management and Program Support, Health Resources and Services Administration (HRSA), HHS. *Id.* at 7. The Division comprises two branches: the General Acquisitions Branch (GAB), which handles smaller, simplified contracts, and the COB, which handles larger, negotiated contracts. Pet. App. 5a; C.A. App. 11-12, 18. In January 2000, petitioner was promoted to GS-13 in the same position within the COB. Pet. App. 5a; C.A. App. 7-8.

In July 2003, Alexandria Garcia (Garcia), a younger Hispanic female, who was serving as the Acting Team Leader of the GAB, classified at GS-13, was non-competitively promoted to GS-14, and her supervisory position over the GAB was made permanent. Pet. App. 6a-7a; C.A. App. 14, 52. In August 2003, after learning that Garcia had been promoted to GS-14, petitioner contacted an HHS Equal Employment Opportunity (EEO) counselor and later filed a complaint, alleging discrimination based on race, national origin, sex, and age. *Id.* at 57-59, 64. Petitioner claimed that HHS discriminated against him by promoting Garcia to a GS-14 supervisory position even though he had superior qualifications for such a promotion. *Id.* at 59, 65-70.

a. As a result of petitioner's complaint, an administrative investigation commenced pursuant to 29 C.F.R. 1614.108, which authorizes an agency-appointed EEO investigator to compel the production of documents, propound interrogatories, take sworn testimony, and conduct "any other fact-finding methods that efficiently and thoroughly address the matters at issue." 29 C.F.R.

1614.108(b). The investigator obtained, *inter alia*, affidavits of petitioner, three Division management officials, and a witness; petitioner's rebuttal to the affidavits; agency documentation of the relevant employment actions; and a history of the Division's promotions from 2001 forward. C.A. App. 116-117

On May 14, 2004, the EEO investigator issued a final report summarizing the evidence but making no findings of fact as to the ultimate claim of discrimination. C.A. App. 73-85. According to the report and its supporting exhibits, prior to 2001, James Quinn (Quinn) was the head of the COB, and Steven Zangwill (Zangwill) was the head of the GAB. *Id.* at 11-12. In early 2001, Quinn vacated his position, and, due to hiring and promotion restrictions imposed by the new Administration, HHS could not fill the position. *Id.* at 11, 18-19; see Pet. App. 5a. Zangwill assumed supervisory responsibility for both the COB and the GAB and determined that he needed managerial assistance. *Id.* at 5a-6a; C.A. App. 11, 18-19. Around that time, Zangwill and petitioner had several discussions regarding the possibility of petitioner working in the GAB. *Id.* at 13. According to Zangwill, petitioner indicated that he was not interested in working in the GAB because he felt that the simplified contracting process was less challenging and less prestigious. *Ibid.*

To meet his managerial needs, Zangwill appointed the most senior person in the COB and GAB to act as "Acting Team Leader" of the respective branches. C.A. App. 19; see Pet. App. 6a. No promotion in grade-status accompanied the appointments. Zangwill chose Frank Murphy (Murphy), GS-13, to serve as the Acting Team Leader of the COB because he was "the senior specialist in the branch" and "had a vast knowledge and experi-

ence processing negotiated contracts." C.A. App. 13; see *id.* at 19, 124. Petitioner does not allege discrimination in Murphy's appointment to that position.[1] Pet. App. 6a.

Similarly, Zangwill chose Garcia to serve as Acting Team Leader of the GAB. Pet. App. 6a; C.A. App. 12-13, 111-112. Before that appointment, Garcia had gained substantial experience and demonstrated expertise in the GAB simplified contracting process. *Id.* at 12-13; see Pet. App. 10a. She began work in the GAB in 1996 and, for several months, was the only Division employee handling the simplified contracts. C.A. App. 12-13. She had trained other GAB employees, created standardized templates for simplified contract solicitations and awards, and prepared special reports for the department's budget office. *Id.* at 12. At the time of her appointment, Garcia was handling the greatest number of contracts in the GAB. *Ibid.*

In late 2001, with the hiring and promotion restrictions still in place, Zangwill received authorization to fill just one GS-14 position through the competitive promotion process, see 5 C.F.R. 335.102-103. C.A. App. 13-14. He chose to advertise for the Lead Contract Specialist position in the COB. *Ibid.* Petitioner communicated his desire to be promoted to GS-14 to Zangwill, and he applied for the position. Murphy was selected for the posi-

[1] In a rebuttal affidavit submitted to the EEO investigator, petitioner claimed that Murphy was not selected as Acting Team Leader because of his seniority in the COB but that Murphy had been transferred from the GAB to assume the Acting Team Leader position. C.A. App. 93. Before the district court, HHS submitted the affidavit by the Director of the Division corroborating Zangwill's assertion that Murphy was not moved from the GAB to the COB in 2001 and that "Murphy has never been assigned to the [GAB]." 05-cv-2387-PJM Docket entry No. 8, Exh. 11 (D. Md. Nov. 15, 2005). Petitioner did not dispute that fact before the district court.

tion, however, due to his greater experience and relevant education. *Ibid.*; see Pet. App. 6a. Petitioner does not allege discrimination in Murphy's promotion to that position. *Ibid.*

In early 2002, Division supervisors informed petitioner that he could be promoted to a different GS-14 position that was to become available soon. C.A. App. 20, 30. That position depended on the Division reaching an agreement with a division of the United States Department of Justice to provide procurement services. *Ibid.* The agreement was never reached, however, and petitioner did not receive the promotion. *Ibid.*

Meanwhile, Garcia continued to perform "expertly" as Acting Team Leader of the GAB, even as her compensation remained fixed at the GS-13 level. C.A. App. 14, 79. In early 2003, Zangwill requested a non-competitive promotion for Garcia based on her assumption of additional duties, see 5 C.F.R. 335.103(c)(3)(ii). C.A. App. 14, 19, 79. HRSA supervisors directed a human resource specialist to assess Garcia's position in a "desk audit," a review of an employee's job description, actual work performed, and grade-status classification. *Id.* at 14, 46-50; see Pet. App. 6a. The audit supported the promotion, and with the HRSA Administrator's authorization, Garcia was promoted to Lead Contract Specialist in the GAB in July 2003. C.A. App. 14, 82. Thereafter, petitioner contacted an HHS equal employment counselor. *Id.* at 57-58.

b. Petitioner requested a hearing before an Equal Employment Opportunity Commission (EEOC) administrative law judge, and the parties engaged in additional discovery during the fall of 2004, pursuant to 29 C.F.R. 1614.109(a), (d). C.A. App. 118-190. HHS submitted responses to petitioner's discovery requests and pro-

duced relevant documents. *Id.* at 118-140. HHS produced additional documents in connection with its motion for summary judgment before the ALJ. *Id.* at 170-190.

2. In August 2005, before a final administrative decision was made, petitioner filed this civil action in the district court against respondent Michael O. Leavitt, Secretary of HHS, pursuant to the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* Pet. App. 4a; C.A. App. 5-10. The complaint alleged that despite his "excellent service at HRSA and his superior qualifications for promotion to a [GS] 14 supervisor position, based upon his race, national origin, sex, and age, [petitioner] has been denied promotion to such a position, while a lesser qualified, younger, white female was promoted in his stead without competition." *Id.* at 8.

On November 15, 2005, before the parties conducted discovery in the district court, HHS filed a motion to dismiss, or in the alternative, for summary judgment on the grounds that, *inter alia*, petitioner could not establish a prima facie case of non-promotion or show that HHS's legitimate non-discriminatory reason for promoting Garcia was pretextual. Pet. App. 4a-5a; C.A. App. 2. In support of that motion, HHS submitted the evidence discovered in the administrative proceedings, including the EEO investigative report, accompanying affidavits by both parties, and agency records. 05-cv-2387-PJM Docket entry No. 8 (D. Md. Nov. 15, 2005). Petitioner opposed the motion, contending that he could establish a prima facie case of discriminatory failure to promote and that he should be allowed discovery to develop evi-

dence of pretext. *Id.* No. 14 (Jan. 13, 2006); C.A. App. 98-104. In support of his motion for discovery, petitioner filed an affidavit under Rule 56(f) of the Federal Rules of Civil Procedure. The Rule 56(f) affidavit outlined areas in which petitioner sought discovery, including (1) discussions between petitioner and his supervisors concerning his stated desire to be promoted to a GS-14; (2) the manner in which management approached petitioner concerning a potential transfer to the GAB in 2001; (3) the reasons for management's decision to request the desk audit for Garcia which resulted in her promotion to GS-14; and (4) the circumstances surrounding the restrictions on GS-13/14 promotions within HHS during 2001-2003. C.A. App. 98-103.

In an oral ruling following a hearing on March 27, 2006, the district court granted respondent's motion for summary judgment. Pet. App. 4a-12a; C.A. App. 3. The court acknowledged that no discovery had been conducted in its forum but noted that "there's been ample document exchange at the administrative level in this case." *Id.* at 9a. The district court found no direct evidence of discrimination and expressed doubt that petitioner could make a prima facie case under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. 8a. In particular, the court observed that there was "a certain amount of appeal" to HHS's contention that petitioner could not show he was denied a promotion because the promotion that Garcia received through the desk audit was one for which only she, and not petitioner—having never worked in the GAB—was eligible. *Id.* at 9a. Because the court found it "arguable," however, that discrimination could be accomplished by a non-competitive promotion through a desk audit, the court assumed for the

sake of argument that petitioner could show a prima facie case. *Id.* at 9a-10a.

Continuing the *MacDonnell Douglas* analysis, the court found that HHS had established a legitimate non-discriminatory reason for elevating Garcia to GS-14. Pet. App. 10a-11a. Garcia was "well-qualified" for the position, and certainly not less qualified than petitioner, because she had served well in the GAB for a number of years, including 24 months as the GAB Acting Team Leader. *Id.* at 10a.

In the court's view, the crucial question was "whether there is any basis for going forward now on the issue of pretext." Pet. App. 11a. The court rejected petitioner's argument that he need not make any showing of pretext to obtain discovery on that issue, despite HHS's showing of a non-discriminatory explanation for the promotion. *Id.* at 12a. Instead, the court explained, petitioner bore the burden of showing "some indication of potential illegal discrimination" before discovery would be permitted. *Ibid.* The court found, however, that there was "absolutely no evidence" that illegal discrimination motivated HHS's promotion decision. *Id.* at 11a. Finding not "the least suggestion of any illegal discrimination," the court granted HHS's motion for summary judgment. *Id.* at 11a-12a.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-3a. The court observed that "summary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Id.* at 2a (brackets in original) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). Additionally, the court explained that a Rule 56(f) motion should be granted "if the motion identifies relevant information

and there is some basis for believing the information actually exists." *Ibid.* The court concluded, however, that "Richard failed to identify relevant information or demonstrate that information relevant to his claim actually existed." *Id.* at 3a. Accordingly, the court held that the district court did not abuse its discretion in denying petitioner's motion for discovery and that entry of summary judgment was appropriate. *Ibid.*

**ARGUMENT**

The court of appeals correctly affirmed the denial of petitioner's Rule 56(f) motion and the grant of summary judgment for respondent. The court of appeals' fact-bound ruling raises no issue of law warranting this Court's review. Nor does the court of appeals' fact-specific application of Rule 56(f) conflict with any decision of other courts of appeals. Further review is therefore unwarranted.

1. The court of appeals' application of Rule 56 is correct and does not warrant this Court's review.[2] A defending party may move for summary judgment "at any time." Fed. R. Civ. P. 56(b); see *First Nat'l Bank* v. *Cities Serv. Co.*, 391 U.S. 253, 280 n.17 (1968) (approving entry of summary judgment even though defendant never filed an answer to complaint). A court should grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the

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[2] References to Rule 56 are made to the version of the Rule in effect in March 2006, when the district court issued its order. The current version, effective December 1, 2007, differs in no substantive manner. See Fed. R. Civ. P. 56 (2007).

moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Regardless of when a motion for summary judgment is filed, a party opposing a properly "made and supported" motion for summary judgment bears the same burden. Fed. R. Civ. P. 56(e). The opposing party "may not rest upon the mere allegations or denials of the adverse party's pleading" but "must set forth specific facts showing that there is a genuine issue for trial." *Ibid.*; see *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Alternatively, the opposing party may seek relief under Rule 56(f), which suspends an opposing party's obligation to produce evidence of a triable issue if the party shows by affidavit that, for "reasons stated," it cannot present "facts essential to justify its opposition." Fed. R. Civ. P. 56(f).

While Rule 56(f) permits a party that has not had an adequate opportunity for discovery to avoid summary judgment, *Anderson*, 477 U.S. at 250 n.5, it "is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious." *Willmar Poultry Co.* v. *Morton-Norwich Prods., Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), cert. denied, 424 U.S. 915 (1976). Instead, the courts of appeals construe Rule 56(f) as requiring the opposing party to "articulate some plausible basis to support a belief that discoverable material exists which, if available, would suffice to raise a trialworthy issue." *Filiatrault* v. *Comverves Tech., Inc.*, 275 F.3d 131, 138 (1st Cir. 2001); see, *e.g.*, *Messina* v. *Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006) (opposing party cannot "offer[] only a 'conclusory assertion without any supporting facts' to justify the proposition that the discovery sought will produce the evidence re-

quired") (quoting *Byrd* v. *EPA*, 174 F.3d 239, 248 n.8 (D.C. Cir. 1999)); *Willmar Poultry Co.*, 520 F.2d at 297 (opposing party must "affirmatively demonstrat[e] * * * how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact").

The court of appeals' decision is consistent with Rule 56(f). The court construed Rule 56(f) as directing the court to withhold summary judgment and permit discovery where the opposing party "identifies relevant information [to be discovered] and there is some basis for believing the information actually exists." Pet. App. 2a. That principle follows from Rule 56(f)'s requirement that the opposing party specify reasons that justify discovery; and it parallels other courts of appeals' requirement that the opposing party "articulate some plausible basis for the party's belief that specified 'discoverable' material facts likely exist which have not yet come in from the cold." *Paterson-Leitch Co.* v. *Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985, 988 (1st Cir. 1988); see *Messina*, 439 F.3d at 762; *Filiatrault*, 275 F.3d at 138; *Willmar Poultry Co.*, 520 F.2d at 297.

Petitioner misreads the court of appeals' decision in claiming (Pet. 22) that it adopted "a rule that requires the plaintiff in a discrimination case to produce evidence that the employer's stated reasons for its actions are pretextual before being allowed any discovery at all." The court announced no such per se rule conditioning discovery on a plaintiff's production of evidence, much less a rule specific to discrimination cases. See Pet. App. 2a. Rather, the court simply required the plaintiff to provide a plausible explanation of how discovery would lead to particular, material evidence and con-

cluded based on the facts and circumstances of this case that the district court properly concluded that petitioner failed to meet that burden. Nothing in the court's four-paragraph-long, unpublished per curiam decision misstates the general principles governing Rule 56(f).

At bottom, the crux of petitioner's claim is that the court of appeals erred in concluding the district court acted within its discretion in applying Rule 56(f)'s standard to the specific facts of this case. That fact-bound conclusion warrants no further review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In any event, the district court acted within its discretion in denying petitioner's Rule 56(f) motion. The district court denied the motion for discovery and entered summary judgment because petitioner did not carry his burden on the issue of whether HHS's nondiscriminatory explanation for promoting Garcia, and not petitioner, was pretextual. Pet. App. 8a-9a. In reaching that conclusion, the district court took into account "the fact that there's been ample document exchange at the administrative level in this case." *Id.* at 9a. Indeed, through the EEO investigator and before the EEOC, the parties engaged in substantial discovery, see pp. 2-6, *supra*, for which petitioner had the same counsel who represents him in this action, see C.A. App. 163.

Nevertheless, petitioner was unable to aver "some plausible basis to support a belief that discoverable material exists" on the issue of pretext. *Filiatrault*, 275 F.3d at 138. Rather than demonstrate how discovery would lead to particular evidence of pretext, petitioner's Rule 56(f) affidavit sought discovery in general terms of all persons and documents related to the personnel deci-

sions. Much of the documentary evidence that petitioner sought, however, had already been disclosed at the administrative level. For example, the record already included the documents associated with Garcia's promotion, as well as affidavits by the supervisors involved explaining how the decision was made. See *id.* at 46-50, 107-140, 170-190. Other information petitioner sought, such as the discussions between him and his supervisors regarding his desire for promotion, see C.A. App. 99-100, was in his possession because he participated in those discussions. Thus, although discovery had not occurred in the district court, this was not a case in which essential facts surrounding petitioner's claim remained undisclosed. See Pet. 11-16; cf. *Miller* v. *Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303 (2d Cir.), cert. denied, 540 U.S. 823 (2003) (finding Rule 56(f) affidavit sufficient because it identified particular information that "was the critical issue in plaintiff's claim" and was clearly in defendant's possession). Ample information had been disclosed to petitioner through the administrative review process.

Petitioner argues (Pet. 34-37) that he needs the opportunity to depose decision makers who averred nondiscriminatory reasons for promoting Garcia in order to test his theories of pretext. Petitioner's theories, however, are based upon pure speculation. Cf. *VISA Int'l Serv. Ass'n* v. *Bankcard Holders of Am.*, 784 F.2d 1472, 1475-1476 (9th Cir. 1986). Because petitioner averred no "reason to question the veracity of affiants," his theories did not as a matter of law require the district court to permit discovery under Rule 56(f). *Strang* v. *United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (affirming denial of Rule 56(f) motion where affidavit sought depo-

sitions to "test and elaborate the affidavit testimony already entered"); see *Davis* v. *G.N. Mortgage Corp.*, 396 F.3d 869, 885 (7th Cir. 2005) (affirming denial of Rule 56(f) motion where the "only reason to believe that additional, relevant evidence would materialize from deposing the defendants' employees is [plaintiffs'] apparent hope of finding a proverbial 'smoking gun'"). Accordingly, further review is unwarranted.

2. Contrary to petitioner's assertion (Pet. 23-27), the court of appeals' unpublished decision in this case does not conflict with decisions of other courts of appeals. Petitioner mistakenly contends (Pet. 27) that the Fourth Circuit has now held, in contrast to other courts of appeals, that "it is necessary to 'balance' the costs of discovery against the plaintiff's need for discovery" in ruling on a Rule 56(f) motion. The court of appeals' decision makes no mention of any need to balance discovery costs against the plaintiff's discovery needs and therefore adopts no such rule. See Pet. App. 1a-3a. Instead, the "balancing" language that petitioner cites is found in the district court's oral ruling. *Id.* at 12a. And even then, the district court's denial of petitioner's Rule 56(f) motion ultimately rested upon petitioner's failure to show how discovery would create an issue for trial, not upon a balancing of discovery's potential costs and benefits. See *id.* at 11a. ("Had there been the least suggestion of illegal discrimination, * * * the Court might have said, let's go forward with discovery.").

As noted above, the court of appeals stated simply that the party opposing summary judgment must identify relevant information to be discovered and provide a basis for believing the information actually exists. Pet. App. 2a; see, *e.g.*, *Ingle ex rel. Estate of Ingel* v. *Yelton*, 439 F.3d 191, 196 (4th Cir. 2006) (same standard). Al-

though petitioner canvasses decisions of other court of appeals (Pet. 23-27), he does not explain how any particular decision endorses a standard that conflicts with the standard used in this case. In fact, while the courts of appeals describe the Rule 56(f) standard in varying formulations, their formulations are remarkably consistent in substance.[3] Accordingly, there is no reason to believe that the linguistic variations that do exist would lead to different results in individual cases, much less on the record of this case.

3. In any event, this petition for a writ of certiorari is an ill-suited vehicle for any broad pronouncement on

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[3] See, *e.g.*, *Filiatrault*, 275 F.3d 138 (opposing party must "articulate some plausible basis to support a belief that discoverable material exists which, if available, would suffice to raise a trialworthy issue"); *Miller*, 321 F.3d at 303 (opposing party must identify facts sought that will create a triable issue and the party's previous efforts to obtain those facts); *Doe* v. *Abington Friends Sch.*, 480 F.3d 252, 255 n.3 (3d Cir. 2007) (opposing party must identify "what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.") (quoting *Dowling* v. *City of Phila.*, 855 F.2d 136, 140 (3d Cir. 1988)); *Culwell* v. *City of Fort Worth*, 468 F.3d 868, 873 (5th Cir. 2006) (opposing parties must "adequately specif[y] how the discovery they want[] could give rise to a genuine issue of material fact"); *Cacevic* v. *City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000) (opposing party must "indicate * * * its need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information."). Petitioner describes (Pet. 23) the Eleventh Circuit's decision in *Harbert Int'l, Inc.* v. *James*, 157 F.3d 1271 (1998), as balancing the costs and benefits of discovery under Rule 56(f), and therefore as conflicting with decisions of other circuits. That balancing approach is not presented here, however, nor does it appear that the Eleventh Circuit has followed it in subsequent cases. See, *e.g.*, *Hall* v. *United Ins. Co.*, 367 F.3d 1255, 1259 n.2 (2004); *Burks* v. *American Cast Iron Pipe Co.*, 212 F.3d 1333, 1336 (2000). Accordingly, this case does not present a conflict with other courts warranting this Court's intervention.

Rule 56(f) because petitioner is likely unable to state a prima facie claim of discrimination. The district court only assumed and did not decide that petitioner could state a prima facie case. Pet. App. 9a. A basic element of petitioner's prima facie case is that he was denied a promotion to a position for which he was eligible. See, *e.g.*, *Nichols* v. *Southern Ill. Univ.*, 510 F.3d 772, 783 (7th Cir. 2007). Petitioner cannot state his case because, although he was eligible for *some* GS-14 supervisory positions, he was not eligible for the specific promotion Garcia that received. That promotion was a reclassification of the GAB Acting Team Leader position that Garcia (and only Garcia) already held. Pet. App. 10a; C.A. App. 14, 19, 79. Petitioner worked in a different branch and held a different position that was not eligible for reclassification to Lead Contract Specialist of the GAB. Pet. App. 10a. Simply put, not all GS-14 supervisory positions are fungible.[4] Therefore, even if this Court remanded the case to the district court for further proceedings, petitioner's claim would still likely fail. Accordingly, petitioner's claim does not warrant further review.

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[4] To the extent that petitioner claims in this Court that HHS discriminated against him by not promoting him to the GAB Acting Team Leader position in July 2001 (Pet. 35), he contradicts his theory in the district court that the discrimination occurred in promoting Garcia to a GS-14 in July 2003. See C.A. App. 197-198 (District court: "[Y]ou're complaining that she got the desk audit and the 14." Petitioner's counsel: "Yes, and they filled it as a 14, that's correct.").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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